CRIMINAL APPEAL No.147 OF 1988

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Against the judgment and order dated 21.3.1988 passed by Sri Narendra Bahadur Verma, Sessions Judge, Nalanda at Biharsharif in Sessions Trial No.216/86.

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1.Binod Prasad
2.Manoj Prasad
3.Chandrashekhar Kumar----------Appellants

Versus

The State of Bihar----------Respondent

***

For the appellants : Mrs.Rina Sinha, Advocate
(Amicus Curiae)

For the State : Mr. Lala Kailash Bihari Prasad,
Addl.P.P.

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P R E S E N T

THE HON'BLE MR. JUSTICE SUDHIR KUMAR KATRIAR

THE HON'BLE MR. JUSTICE SYED MD.MAHFOOZ ALAM

***

S.K.Katriar &
S.M.M.Alam, JJ. This criminal appeal has been preferred against the judgment and order dated 21.3.1988, passed by Sri Narendra Bahadur Verma, Sessions Judge, Nalanda at Biharsharif, in Sessions Trial No.216/86, whereby he has been pleased to convict appellant no.1 Binod Prasad under Section 302 of the Indian Penal Code, and Section 27 of the Arms Act, and sentenced him to undergo imprisonment for life under Section 302 of the I.P.C., and rigorous imprisonment for three years under Section 27 of the Arms Act. He has further been pleased to convict the remaining two appellants, namely, Manoj Prasad and Chandrashekhar Prasad under Sections 302/34 and 323 of the I.P.C., and sentenced each of the appellants to undergo imprisonment for life under Section 302/34 of the I.P.C., and rigorous imprisonment for six months under section 323 of the I.P.C., and ordered that all the sentences shall run concurrently.

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2. The prosecution case, as per the fardbeyan of Govind Kumar (P.W.7) son of deceased Dwrika Prasad recorded by S.I. Balmiki Sharma (P.W.8) on 26.12.1985 at 12.00 noon at village Kakhara in Kewali Khandha within Noorsarai Police Station, District Nalanda, in brief, is that on 26.12.1985 at about 6 A.M. Dwarika Prasad (deceased), father of the informant, was uprooting the Dhania crop from his field for selling it in the market. The informant's uncles Mathura Prasad and Shyamlal Prasad were assisting the informant's father. The field from which the informant's father was uprooting Dhania is situated in Kewali Khandha. In the meantime, the informant's father noticed that the field of Manoj Prasad (appellant no.2) was being irrigated and he was taking water for the purpose of irrigation through his field. At this the informant's father asked appellant Manoj Prasad not to take water through his field as he had not allowed him to irrigate his field by taking water his the field as a result of which the potato field of the informant remained unirrigated. At this some altercation took place between the informant's father and said Manoj Prasad and Manoj Prasad left the place. Further case is that at about 8.30 A.M. the said Manoj Kumar again came along with appellants Binod Prasad and Chandrashekhar Kumar and with his mother. Appellant no.1 Binod Prasad was armed with country made pistol and the rest appellants were armed with lathi. As soon as they came near the informant's father, Binod Prasad, who was armed with country made pistol, fired at his father who sustained injury at his waist on the right side. Being injured he fell down in the potato field of Ramautar Mahto. Thereafter appellants Manoj and Chandrashekhar Kumar assaulted him with lathi. The informant, his uncle Marthua Prasad and Shyamlal Mahto tried to save the ifnromant's father whereupon both the appellants assaulted them with lathi as a result of which the

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informant and his both uncles received injuries on their persons. After about five to seven minutes of receiving firearm injury, the informant's father succumbed to his injuries. On hulla and on hearing the sound of firing the farmers who had their fields in the vicinity including Manoj Kumar, son of Jidhu Mahto, Ramashish Prasad son of Kishun Mhato and several others reached there and witnessed the occurrence. However, the appellants managed to escape. The above farddbeyan was given in presence of the witnesses, namely, Raghu Mahto and Anjani Kumar of village Kakhara and both the persons put their signatures as witnesses of the fardbeyan. It appears that signature of witness Anjani Kumar has been marked as Ext.1, signature of Raghu Mahto has been marked as Ext.1/1 and signature of Govind Kumar (informant) has been marked as Ext.1/2 but inadvertently on the fardbeyan it has wrongly been mentioned as Ext.1/3. The entire fardbeyan has been marked as Ext.4.

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3. After recording the said fardbeyan, S.I. Balmiki Sharma sent the same to Noorsarai Police Station for institution of the first information report and at the spot he took up the investigation and on receipt of the fardbeyan at the concerned Police Station, Noorsarai P.S. Case No.109/85 dated 26.12.1985 under Sections 302 and 323/34 of the Indian Penal Code and Section 27 of the Arms Act was instituted and accordingly, formal F.I.R. was drawn.

4. During investigation Sri Balmiki Sharma inspected the place of occurrence, prepared inquest report of the deceased (Ext.5), recorded the statements of the witnesses and after receipt of post mortem report and injury reports, he submitted charge sheet against the abovenamed appellants besides Rajeshwari Devi who has been acquitted by the trial court. On submission of the charge sheet, cognizance was taken and the appellants were committed to the Court of Session and

thereafter on 21st July, 1986 charges were framed against the appellants by the Sessions Judge, Nalanda at Biharsharif. The appellants denied the charge and as such they were put on trial and by the impugned judgment, they were convicted and sentenced, as stated above.

5. The defence case, as per the trend of cross-examination, the evidence of the defence witnesses and the fardbeyan of the so-called counter case, in brief, is that on the alleged date of occurrence, no such occurrence had taken place as disclosed by the prosecution in the fardbeyan of the informant rather on the alleged date and time of occurrence, the informant's side assaulted all the appellants with Khanti and lathi and while the appellants were running away from the place of occurrence in order to save their lives, P.W.1 Mathura Prasad opened fire and due to firing done by him, deceased Dwarika Prasad sustained firearm injuries and died. In support of its case, the defence has also examined two D.Ws. and have brought the fardebayn and formal F.I.R. of the counter case on record which have been marked as Exts. A and B, respectively. The defence has also brought injury reports of injured appellants Binod Prasad and Manoj Prasad on record which have been marked as Exts. C and C/1.

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6. In order to prove its case, the prosecution has examined altogether eight witnesses, namely, Mathura Prasad P.W.1, Sanjay Kumar Sinha P.W.2, Anjani Kumar P.W.3, Shyamlal Mahto P.W.4, Dr.Abdul Wahab P.W.5, Dr. Bidhut Bhushan Singh P.W.6; Govind Kumar P.W.7 and Balmiki Sharma P.W.8. Out of the abovesaid witnesses, P.W.7 is the informant of the case. P.W.8 is the Investigating Officer of the case. P.Ws. 5 and 6 are two doctors – one had conducted post mortem examination on the dead body of the deceased and another P.W.6 had examined the injured, namely, Govind Kumar, ShyamLal Mahto and Mathura

Prasad. The rest witnesses are the witnesses of the occurrence. Besides oral evidence, some papers by way of documentary evidence have been brought on record. Exts. 1 series are the signatures of the witnesses and the informant on the F.I.R. Ext.2 is the post mortem report of the deceased Dwarika, Exts.3, 3/1 and 3/2 are injury reports of the injured, Govind kumar, Shyam Lal Prasad and Mathura Prasad , respectively. Ext.4 is the fardbeyan of the informant, Ext.5 is the inquest report of the deceased, Ext.6 is the seizure list and Ext.7 is formal F.I.R.

7. From perusal of the trial court judgment it appears that the trial court has believed the testimony of the prosecution witnesses and has discarded the evidence of the defence witnesses and relying upon the testimony of the prosecution witnesses including the evidence of the doctors, the trial court convicted the appellants and sentenced them as stated above.

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8. First of all, we will like to go through the evidence of P.W.7, the informant, in order to come to the conclusion – as to whether he has supported the case of the prosecution, as disclosed in his fardbeyan which is the basis of this case. His evidence is as follows :-

The occurrence took place on 26.12.1985 at about 8.30 A.M. At that time he was present at Kewali Khandha. His father Dwarika Prasad, uncle Mathura were also there. They were uprooting Dhania crop. His another uncle Shyam Lal Prasad was also present there. They were there since 6 O' clock. At that time appellant no.2 Manoj Prasad was taking out water through his field for the purpose of irrigating his field whereupon the informant's father had stopped him from taking out water through his field. At that time some altercation had taken place between appellant no.2 Manoj Kumar and the informant's

father but at that time Manoj Prasad had returned back to his house. He has further deposed that at about 8.30 A.M. Manoj again came with lathi in his hands along with appellants Binod Prasad and Chandrashekhar Kumar and his mother. Binod (appellant no.1) was armed with pistal and Chandrashekhar Kuamr was armed with lathi and as soon as they came near the informant's father, the mother of Binod exhorted them to kill the informant's father whereupon Binod took out his pistol and fired at his father causing injury on the right side of his waist. The informant's father being injured fell down in the field of Ramautar and thereafter appellants Manoj Prasad and Chandrashekahr assaulted him with lathi. The informant, his uncle Mathura Prasad and Shyamlal Prasad rushed to save the informant's father whereupon appellant no.2 Manoj and Chandrashekhar Kumar assaulted them with lathi as a result of which the informant sustained injury on his right cheek and his uncle received injuries on his head and back. He has deposed that his father died at the spot after 4-5 minutes of the incident. He has further deposed that on hulla Manoj Kumar, Sanjay Kumar, Ramashish Prasad and several other co-villagers reached there and witnessed the occurrence. He has further deposed that after the occurrence he gave the fardbeyan before the police officer.

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9. The examination-in-chief of P.W.7 (informant) shows that he has fully corroborated the prosecution case as disclosed in his fardbeyan. It appears that he was cross-examined at length by the defence on several points and by way of cross-examination the defence has tried to show that the story that on the alleged date of occurrence the appellant no.2 Manoj Prasad was taking out water through the field of informant in order to irrigate his own field was false but the entire cross examination of the defence is of no avail when the F.I.R. of

the so-called counter case instituted on the basis of fardbeyan of appellant no.1 Binod Prasad (Ext.A) establishes that the occurrence had taken place when the informant side obstructed him (appellant no.1) from taking water through the field of informant which was objected by appellant Binod Prasad whereupon he was assaulted by the informant's side. The date, time and place of the counter case instituted by appellant Binod Prasad is same and the genesis is also admitted in the counter case so all the efforts of the defence lawyer to show that on the alleged date and time of occurrence no incident of assault had taken place due to the stoppage of flow of water to the field of appellants are of no avail.

10. Let us see - whether the other witnesses have corroborated the evidence of P.W.7 or not.

11. P.W.1 Mathura Prasad is the own brother of the deceased. He has deposed that his borhter had been killed about eight months ago at about 8.30 A.M. on a Thursday. At that time he was in the Khalihan of Karu Yadav, his co-villager Dwarika Prasad was also in the Khalihan. In the meantime, appellants Binod Prasad, Manoj Prasad and Chandrashekhar Kuamr and the mother of Binod came there. Binod had kept concealed one pistol under his cloth. He took out pistol and shot at his brother Dwarika Prasad who sustained firearm injury and fell down and thereafter appellants Manoj Prasad and Chandrashekhar Kumar assaulted him with lathi. The mother of Binod gave order to kill his brother deceased Dwarika Prasad. He rushed to save his brother whereupon Manoj Prasad and Chandrashekhar assaulted him with lathi as a result of which he also sustained injury on the left side of his head and shoulder and left side of the waist. He has further deposed that Manoj and Chandrashekahr had also assaulted his nephew Govind Prasad and his elder brother Shyamlal Prasad. He has further deposed that adjacent to

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Khalihan there is field of Ramautar Mahto in which deceased Dwrika Prasad fell down after receiving gunshot injury and just after 5 to 7 minutes he died. He has further deposed that he along with his elder brother and nephew were treated at Biharsharif Hospital. He also identified the accused persons who were present in court.

12. From the evidence of P.W.1 it appears that he has not uttered even a single sentence with regard to first occurrence which had taken place at about 6 A. M. on that very date. Barring that, he has corroborated the evidence of P.W.7 on all the material points. His cross-examination shows that he was also cross-examined at length on the point of location of the fields of the deceased and the appellants in order to show that the story of taking away water through the field of the deceased by the appellants was untrue and so, the very genesis of the case was not proved but this lengthy cross-examination does not affect the prosecution case as we have already pointed out above that in the counter F.I.R. which was instituted on the basis of the fardbeyan of appellant no.1 Binod Prasad, it has been admitted that on the alleged date, time and place of occurrence the incident of assault had taken place on the question of stoppage of flow of water for irrigation purpose and thus, the date and timing of this occurrence along with the genesis of the occurrence is also admitted. In such circumstance, we are of the view that the lengthy cross-examination on the point of location of the field of the informant and the appellants is of no help to the defence.

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13. As regards manner of occurrence is concerned, I find that P.W.1 has fully corroborated the evidence of P.W.7 that firstly appellant no.1 Binod Prasad fired from his pistol causing injury to deceased Dwarika Prasad who being injured fell down in the field of Ramautar Mahto and thereafter the

other two appellants assaulted him with lathi. He has also corroborated this fact that appellants, namely, Manoj Prasad and Chandrashekhar also assaulted him, his nephew Govind Kumar and his elder brother Shyamlal Prasad with lathi. Thus, it appears that P.W.1 has also corroborated the manner of occurrence, as stated in the fardbeyan of the informant and in the evidence of P.W.7 and he has stood the test of cross-examination.

14. P.W.2 is Sanjay Kumar Sinha. He is a co-villager of deceased Dwarika Prasad. He has deposed that on 26.12.1985 at about 8 A.M. he was at Shivalaya of his village and near the said place Govind Prasad (P.W.7), Shyamlal Prasad (P.W.4) and Mathura Prasad (P.W.1) were also present. Deceased Dwarika Prasad was sitting at a distance of about 20 feet south from Shivalaya and in the meantime, appellants Binod, Manoj and Chandrashekhar along with their mother came there. As soon as they reached near Dwarika Prasad, appellant no.1 Binod started abusing him (Dwarika Prasad) and shouted to kill him and thereafter Binod Prasad took out his pistol and shot at Dwarika Prasad, who received injuries on his chest. After that, appellant no.2 Manoj Prasad assaulted the deceased with lathi. He has further deposed that Shyamlal, Mathura and Govind rushed towards Dwarika Prasad but they were assaulted by appellants Manoj Prasad and Chandrashekhar with lathi. He has further deposed that when he protested he was threatened by the appellants. The evidence of P.W.2 shows that he has also supported the prosecution case but with some variation as there is no such prosecution case that appellant no.1 Binod Prasad ordered to open firing upon the deceased, abused him and then shouted to kill him. Likewise, his evidence that only appellant no.3 Chandrashekhar had assaulted the deceased with lathi is also not consistent with the prosecution case and there is

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specific case of the prosecution that when Dwarika Prasad fell down Manoj Prasad and Chandrashekhar both assaulted the deceased with lathi. Thus, there appears some variations in the evidence of P.W.2 but we are of the view that these variations cannot be treated as discrepancies or infirmities in the evidence of the prosecution witnesses as due to lapse of time, the picture of any incident started diminishing in the mind of the individual and so, some variation in the evidence of the prosecution witnesses who were examined after a lapse of about 9 months of the occurrence is natural and only on this score his entire evidence cannot be discarded. His cross-examination shows that he is consistent on this point that after sustaining fire-arm injury deceased Dwarika Prasad fell down in the field of Ramautar. He is also consistent on this point that only one firing was done and there was no second firing. This is the specific case of the prosecution that only one firing was done and if this witness was not the eye-witness of the occurrence then he could have stated that the accused persons had fired several rounds. But he is very specific that only one firing was done which shows that this witness is trustworthy one.

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15. P.W.3 Anjani Kumar is not a witness of the occurrence. He has deposed that on 26.12.1985 Dwarika was murdered and the fardbeyan of Govind in connection with the said murder was recorded by the Sub-Inspector in his presence. He has proved his signature upon the said fardebyan as well as signature of Raghu Mahto and the informant Govind Kumar which were marked as Exts. 1 and 1/1. He has also proved his signature on the inquest report of the deceased which was marked as Ext.1/2. Since this witness is not on the point of occurrence, as such we do not feel necessary to discuss his evidence.

16. P.W.4 Shyamlal Mahto is the own brother of the deceased. His evidence shows that he is a witness of both the incidents which had taken place at 6 A.M. as well as at about 8.30 A.M. on the alleged date of occurrence. According to his evidence, at about 6 A.M. he was present at the field situated in Kewali Khandha where he was uprooting Dhania and Muli from his field along with his brother Dwarika Prasad. He has further deposed that appellant no.2 Manoj Prasad was taking away water to his field through the field of his brother Dwarika Prasad for irrigating his wheat crop whereupon his brother Dwarika Prasad told Manoj that about three days ago he had not allowed him to take water from his field then why he was taking away water for irrigation through his field. At this, some altercation took place between the appellants Manoj and Dwarika and Manoj Prasad left the place but again he came back with appellants Binod Prasad and Chandrashekhar Kumar alongwith his mother and as soon as they came near Dwrika Prasad, who was sitting on a ridge of the field of Ramautar, appellant no.1 Binod Prasad took out his pistol and shot at him. Dwarika received injury and fell down and then Manoj and Chandrashekhar assaulted him with lathi. He has further deposed that when he rushed to save Dwarika Prasad, he was assaulted by appellants Manoj and Chandrashekhar with lathi as a result of which he, Mathura and Govind Kumar sustained injuries on their persons. This witness has also been cross-examined at length on the point of location of the field of the informant and the appellants and on the point of taking out water by the appellants through the field of the informant for irrigating their field but this lengthy cross-examination by the defence lawyer is of no help to the defence for which reasons have already been given in the earlier paragraph. It has been submitted by the learned Amicus Curiae that this witness as well as P.W.1 Mathura Prasad are

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highly interested witnesses, being the own brother of the deceased and therefore, their testimony should not be relied upon. It is settled principle of law that the testimony of interested witnesses cannot be discarded only on the ground of interestedness rather cautious approach should be taken in relying upon the testimony of interested witnesses. In the instant case, although it is true that both the abovenamed witnesses are highly interested witnesses being the own brother of the deceased but since they are also injured witnesses and the evidence of P.W.6 Dr. Bidhut Bhushan Singh shows that on examination of the body of P.W.1 Mathura Prasad and P.W.4 Shyamlal Mahto, he had found injuries on their persons which corroborates the prosecution case that at the time of occurrence P.W.1 and P.W.4 had also received injuries on their persons. There is specific case of the prosecution that when the informant and the above two witnesses rushed to save deceased Dwarika Prasad, they were also assaulted by appellant nos. 2 and 3 and this story finds corroboration from the evidence of P.W.6 as well as Exts. 3/1 and 3/2. The same view can be taken with regard to the credibility of the testimony of P.W.7, the informant of this case as according to the prosecution case, he had also sustained injuries on his person at the hands of appellant nos. 2 and 3 at the time of alleged occurrence and P.W.6 has also corroborated this fact by deposing that he had also found injuries on the person of Govind Kumar which were caused by hard and blunt substance. The injury report (Ext.3) issued by P.W.6 also supports the evidence of the doctor. Thus, the presence of the abovementioned witnesses including the informant at the place of occurrence at the time of the alleged occurrence appears to be beyond doubt and there is no reasonable ground for us to discard the evidence of the above-mentioned witnesses.

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17. P.W.6 is Dr. Bidhut Bhushan Singh. According to his evidence, he had examined injured, Govind Kumar, Shyamlal Prasad and Mathura Prasad on 26.12.85 and had found injuries on their persons. According to his evidence, he had found one abrasion ½" x ¼" on the left cheek of Govind Kumar; one abrasion ½" x ¼" on the left frontal region of the scalp of Shyamlal and one lacerated wound 1" x ¼" on the left temporal aspect of the scalp of Mathura Prasad besides swelling ½" x ½" on his right temporal aspect of the scalp and abrasion ½" x 1/4" on the upper part of left scapular region. He has deposed that all the abovementioned injuries were caused to all the three injured within 12 hours and were caused by hard and blunt substance. He has proved all the three injury reports which have been marked as Exts.3, 3/1 and 3/3, respectively. Thus the evidence of P.W.6 fully corroborates the case of the prosecution that during the occurrence P.Ws. 1, 4 and 7 had also sustained injuries on their persons caused by lathi, which is hard and blunt substance.

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18. P.W.5 is Dr. Abdul Wahab, who had conducted post mortem examination on the dead body of Dwarika Prasad. His evidence is that on 26.12.1985 he had conducted post mortem examination on the dead body of Dwarika Prasad and had found the following ante mortem injuries on his person :-

Rigor mortis were present in all the four limbs.

(1) one punctured lacerated wound ¼" round with inverted margin 1 1/2 inches below right nipple with tattoing all around.

(2) One punctured lacerated wound with everted margin ½" round on the back of chest below the lower margin of right scapula.

He has deposed that the above two injuries were communicated to each other and injury no.1 was the wound of entrance whereas

injury no.2 was the wound of exit. He has further deposed that he found

(3) Bruise 2" x 1" below the right elbow.

(4) Bruise 2" x 1" below left elbow.

(5) Bruise 3" x 1" on anterior side of left arm.

(6) Bruise 2" x 1" above back of left wrist.

(7)Abrasion 1" x ½ " above right knee in the front.

He has further deposed that on dissection, right chest cavity contained one ounce of clotted blood with right lung torn and punctured. Heart empty and 8th rib fractured at the anterior mammary line (blow right nipple). He also found right lobe of the lever punctured and torn, Diaphram punctured in right, spleen pale, stomach empty. He has opined that the cause of death was shock and haemorrhage from injury nos. 1 and 2 caused by fire-arm. He has proved his post mortem report which has been marked as Ext.2. In cross-examination, P.W.5 has opined that the firing was done from close range which was apparent from tattooing mark. He has further said that in case there is firing from close range, the charring is a must and tattooing will be present if the firing is done from six feet distance.

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19. It has been argued by the learned Amicus Curiae that since P.W.5 has not found mark of charring around the wounds of the deceased, so the absence of charring around the wound of the deceased falsifies the prosecution case that the firing was done from very close range. We are of the view that the evidence of the prosecution witness has not been correctly evaluated by the learned Amicus Curiae as there is nothing in the evidence of the prosecution witnesses that the firing was done from a very close range rather the evidence shows that the firing was done from a distance of few feet. The presence of tattooing marks also supports the prosecution case that the firing was done from a few feet's distance. We are of the view

that the evidence of P.W.5 fully corroborates the prosecution case that appellant no.1 Binod Prasad had shot at the deceased and as result of shooting the deceased sustained injuries and died. The evidence further supports the prosecution case that appellant no.1 had fired only one bullet as P.W.5 did not find any other firearm injury on the dead body of the deceased. Likewise, the evidence of P.W.5 as well as P.W.6 corroborates the prosecution case that during the occurrence the other two appellants had also assaulted the deceased as well as P.Ws.1, 4 and 7 with lathi. Thus, on scrutiny of the evidence of the abovesaid witnesses coupled with the evidence of P.Ws.5 and 7, we have come to the conclusion that the prosecution has fully succeeded in proving the time and manner of occurrence.

20. As regards the place of occurrence, we find that there is consistent evidence of the prosecution witnesses that the deceased had received injuries on his persons while he was sitting on the ridge of the field of Ramautar Mahto and after sustaining firearm injury he fell inside the field of Ramautar Mahto situated in Kewali Khandha of village Kakhra. This fact finds corroboration from the evidence of P.W.8 who is the Investigating Officer of the case. He has deposed at paragraph 3 of his deposition that he visited the place of occurrence at Kewali Khandha within Kakhra village. He has further deposed that the place of occurrence is the potato field of Ramautar Mahto appertaining to plot no.257. He has further deposed that he had found the dead body of deceased Dwarika Prasad lying in the said field and he had prepared the inquest report of the dead body in presence of the witnesses. He has proved the inquest report which has been marked as Ext.5. He has further deposed that he had also found blood scattered at the place where the dead body of Dwarika Prasad was lying. P.W.8 has given the boundary of the P.O. field which is as follows;

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north- the potato field of deceased Dwarika Prasad, south – the potato field of Kashi Mahto, east- orchard of Karu Gope and west- potato field of Kameshwar Prasad. He has further deposed that he had also found the marks of violence in the field of Ramautar Mahto. Thus, from the evidence of P.W.8 (Investigating Officer), there remains no ambiguity that the place of occurrence of this case is the field of Ramautar Mathto where P.W.8 had found the dead body with trampling marks in the field besides the presence of blood. The prosecution witnesses are consistent that the deceased had sustained firearm injuries while he was sitting on the ridge of the field of Ramautar Mahto and after receiving injuries he fell down in the field of Ramautar Mahto. Thus, we find from the evidence of the prosecution witness that the place of occurrence of this case also stands proved.

21. It has been submitted by the learned Amicus Curiae that the prosecution case should not be believed in view of the fact that the prosecution has failed to explain the injuries which were found by D.W.2 Dr. Birendra Kumar Verma on the persons of appellants Binod Kumar and Manoj Kumar for which a counter case was instituted in Noorsarai Police Station by appellant no.1 Binod Prasad. We have given our anxious thought to this argument of the defence that in every case where the accused side had also sustained some injuries, the prosecution is always bound to explain those injuries. On perusal of the evidence of D.W.2, we have arrived at the conclusion that there was absolutely no necessity for the prosecution to explain the injuries found on the persons of the appellants Binod Prasad and Manoj Prasad as the injuries found on their persons were so simple that both the injured did not try to immediately rush to the doctor for treatment of the injuries rather for complete 28 hours, the injured did not visit any doctor and for the first

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time, they were examined by D.W.2 on the next day of occurrence i.e. on 27.12.85 at 12.30 and 12.35 P.M. This abnormal delay in case of treatment of the injuries of the injured establishes beyond doubt that the injuries found persons of both the appellants were of superficial in nature and for which the prosecution is not bound to give explanation. Likewise, so far the plea that the learned trial court had not considered the case of the defence as made out in the counter case is concerned, we are of the view that the same is also not acceptable in view of the fact that on the next day of the alleged occurrence, a counter case was lodged on the basis of the fardbeyan of appellant no.1 Binod Prasad which can be said to be afterthought. Under such circumstances, we are unable to accept the argument of the learned Amicus Curiae with regard to the above-mentioned points.

22. Much argument has been advanced on behalf of the learned Amicus Curiae that appellant nos. 2 and 3 have wrongly been convicted under Section 302/34 of the Indian penal as the prosecution has failed to bring such evidence on record showing prior meeting of minds of the appellants in committing the murder of the deceased, so the finding of the trial court that the murder of deceased Dwarika Prasad had been committed in furtherance of common intention of other two accused is bad in law. In this regard following decisions have also been cited:- (1) AIR 1996 Supreme Court Page 3532 (Rama Shankar, Appellant Vrs. State of Haryana, Respondent); (2) AIR 1970 Supreme Court Page 219 (Kanbi Nanji Virji & others, Appellants Vrs. State of Gujarat, Respondent) and (3) 2005 Supreme Court Cases (Criminal) Page 127 (Dani Singh and others, Appellants Vrs. State of Bihar).

23. We have gone through the decisions referred above. We are of the view that the fact that certain offence has been

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committed in furtherance of common intention of other accused depends upon the facts and circumstances of each case and no hard and fast rule can be applied in this regard. The term "in furtherance of common intention" means that there must be some pre-planning and prior meeting of mind of all the accused to commit certain offence and in furtherance of that, certain offence has been committed by anyone of them. It is immaterial whether another accused had committed any overt act or not. Mere presence of another accused at the place of occurrence or nearby is enough. Our view finds support from paragraphs 19 and 20 of the decision of the Apex Court delivered in the case of Dani Singh & others, Appellants Vrs. State of Bihar reported in 2005 Supreme Court Cases (Criminal) Page 127. Paragraph 19 of the decision is quoted below:-

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"The section really means that if two or more persons intentionally do a common thing jointly, it is just the same as if each of them had done it individually. It is a well-recognised canon of criminal jurisprudence that the courts cannot distinguish between co-conspirators, nor can they inquire even if it were possible, as to the part taken by each in the crime. Where parties go with a common purpose to execute a common object, each and every person becomes responsible for the act of each and every other in execution and furtherance of their common purpose; as the purpose is common, so must be the responsibility. All are guilty of the principal offence, not of abetment only. In a combination of this kind a mortal stroke, though given by one of the parties, is deemed in the eye of the law to have been given by every individual present and abetting. But a party not cognizant of the intention of his companion to commit murder is not liable, though he has joined his companion to do an unlawful act. The leading feature of this section is the element of participation in action. The essence of liability under this section is the existence of a common intention animating the offenders and the participation in a criminal act in furtherance of the common intention. The essence is

> simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. The participation need not in all cases be by physical presence. In offences involving physical violence, normally presence at the scene of offence may be necessary, but such is not the case in respect of other offences when the offence consists of diverse acts which may be done at different times and places. The physical presence at the scene of offence of the offender sought to be rendered liable under this section is not one of the conditions of its applicability in every case. Before a man can be held liable for acts done by another, under the provisions of this section, it must he established that : (i) there was common intention in the sense of a prearranged plan between the two, and (ii) the persons sought to be so held liable had participated in some manner in the act constituting the offence."

At paragraph 20 the of the decision, the Apex Court has observed thus:-

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> "…… … The totality of the circumstances must be taken into consideration in arriving at a conclusion whether the accused had a common intention to commit offence for which they can be convicted. The facts and circumstances of cases vary and each case has to be decided keeping in view the facts involved. Whether an act is in furtherance of the common intention is an incident of fact and not of law. …"

At paragraph 21 of the decision, the Apex Court has again observed that

> "…… … …The plea that some of the accused persons did not commit any overt act would really be of no consequence".

24. Applying the ratio decided in the abovesaid decision with regard to the facts of this case, we find that the material on record shows that all the appellants had come

to the place of occurrence having been fully prepared to commit the murder of deceased Dwarika Prasad and as soon as they reached near the deceased, appellant no.1 Binod Prasad, who was armed with firearm, fired at him causing injuries to the deceased. The evidence on record shows that there was no immediate provocation to appellant no.1 to kill the deceased nor any defence has been brought on record in this regard, so the only conclusion will be that all the three appellants had gone to the place of occurrence with common intention to kill deceased Dwarika Prasad specially when there is no such evidence that they had dissuaded appellant no.1 from committing the criminal act rather there is consistent evidence of the prosecution witnesses that the appellants were not satisfied with simply shooting the deceased but they were so determined to kill the deceased that even after receiving the firearm injuries by the deceased at the hands of appellant no.1, other two appellants also assaulted the deceased with lathi. All these circumstances fully establish that all the appellants had common intention to kill deceased Dwarika Prasad and in furtherance of common intention they had committed the murder of the deceased Dwarika Prasad. Under such circumstances, we are of the opinion that appellant nos. 2 and 3 have rightly been convicted under Section 302/34 of the Indian Penal Code.

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25. In the result, we find no merit in this appeal and as such, the same is hereby dismissed. The conviction and sentence passed against the appellants by the impugned judgment are upheld. The appellants are on bail, as such their bail bonds stand cancelled and they are directed to surrender at once before the trial court in order to serve out the remaining part of their sentence. It is further

observed that if the appellants do not surrender within a fortnight from the date of receipt of this judgment, the learned trial court shall take coercive steps for their arrest and surrender.

(**Sudhir Kumar Katriar, J.**)

(Syed Md. Mahfooz Alam, J.)

Patna High Court, Patna
The 25th July, 2008
A.F.R. (B.T.)

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CRIMINAL APPEAL NO. 147 OF 1988

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Heard by

THE HON'BLE MR. JUSTICE SUDHIR KUMAR KATRIAR

THE HON'BLE MR. JUSTICE SYED MD.MAHFOOZ ALAM

***

BEFORE

THE HON'BLE MR. JUSTICE SUDHIR KUMAR KATRIAR

(For kind perusal and approval)

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(Syed Md. Mahfooz Alam, J.)

B.T.

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